

Nos. 79-4, 79-5 and 79-491

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

JASPER F. WILLIAMS, M.D., et al., *Appellants*,
and

ARTHUR F. QUERN, Director,
Illinois Department of Public Aid, *Appellant*
and

THE UNITED STATES, *Appellant*,

v.

DAVID ZBARAZ, M.D., et al., *Appellees*.

JEFFREY C. MILLER, Acting Director,
Illinois Department of Public Aid, et al., *Appellants*,

v.

DAVID ZBARAZ, M.D., et al., *Appellees*.

UNITED STATES, *Appellant*,

v.

DAVID ZBARAZ, M.D., et al., *Appellees*.

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF OF THE UNITED STATES
CATHOLIC CONFERENCE AMICUS CURIAE**

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**MOTION FOR LEAVE TO FILE BRIEF OF
UNITED STATES CATHOLIC CONFERENCE
AMICUS CURIAE**

The United States Catholic Conference respectfully
moves this Court for leave to file a brief *amicus curiae*
in this case.

IDENTIFICATION AND INTEREST OF THE AMICUS

I.

Identification of the Amicus

The United States Catholic Conference is a non-profit corporation and an agency through which the Catholic Bishops of the United States collaborate with other members of the Church—priests, religious and laity—in areas where voluntary collective action on an interdiocesan and national basis can benefit the Church and society.

USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, communications and public affairs, with emphasis on the preservation of religious liberty in America.

II.

Interest of the Amicus in This Case

This case affects matters fundamental to our society. It is the conviction of this *amicus* that the Court can only be well served in matters of such wide import when it has assistance from all quarters. Thus, it is a spirit of service which prompts this *amicus* to make this submission.

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**BRIEF OF THE UNITED STATES
CATHOLIC CONFERENCE AMICUS CURIAE**

ARGUMENT

The decisions in the Abortion Cases¹ created an immunity from state interference with the practice of abortion. They did not create an entitlement to benefits. *Maier v. Roe*, 432 U.S. 464 (1977). p. 476. This distinction is crucial because it focuses on the nature of the constitutional question at issue in the instant case. Immunity from state and/or federal prosecution does not in and of itself make abortion an affirmative value to be embraced by society as a whole. However, the decision in the court below in the instant case marks a shift in that abortion is seen as an affirmative good, that is, something that society should encourage by providing resources for it.

The translation of immunity into entitlement is, in the constitutional sense, essentially a legislative matter. Entitlement to draw upon the resources of the public treasury necessarily implies a social commitment to the affirmative value of such expenditures. In fact, common parlance treats support of a given program as willingness to provide financial resources for it. Conversely, financial support is virtual expression of an affirmative value of the thing being supported. There is indeed a social schizophrenia where a society speaks of its lack of affirmative support for a value while at the same time committing economic resources for it.

Regardless of the rhetoric which surrounds the abortion issue, the cold empirical fact is that abortion always involves the taking of human life. In point of fact, this court recognized in *Maier v. Roe*, *supra* the profound nature of policy question centered around

¹ *Roe v. Wade*, 410 U.S. 113 (1973). *Doe v. Bolton*, 410 U.S. 172 (1973).

the abortion issue. Neither the state nor federal legislatures involved in this action have shown any inclination to embrace the practice of abortion as an affirmative social good. In point of fact, the federal government's limitation of federal expenditures occasioned by the "Hyde Amendment" and the action of the Illinois legislature at issue here manifest a social policy which does not favor the practice of abortion. The lower court herein has acted to displace the policy judgment made by the legislatures involved. In effect, that court seeks to create a legal entitlement and award the practice of abortion the status of an affirmative public good.

The court below has held that the state lacks a rational interest in preserving the life of a nonviable fetus. In doing so, the court linked its "approach" to the decision in *Colautti v. Franklin*, 99 S.Ct. 675, 688 (1979). First, we would point out that the court's decision in *Colautti* is simply inapposite with respect to the instant case. As we noted above, the Abortion Cases provide an immunity from prosecution and interference by the state. Those decisions do not mandate an entitlement to benefits. The *Colautti* case dealt with a statute seeking to control and limit the actual practice of abortion, and the decision in that case dealt with viability solely in the context of the direct limitation of the abortion itself. *Colautti* plainly has nothing to do with the state's interest in using its financial resources to support this practice. Thus, it is clear that *Colautti* never held that government lacks a legitimate interest in the life of a nonviable fetus.

This *amicus* directly challenges the major predicate of the decision below. It is our position that the state has a legitimate interest in the life of an unborn child

worthy of the state's affirmative support regardless of the stage of maturity of the child.

To be sure, it is the position of this *amicus* that the right to life is explicitly protected in the Fifth and Fourteenth Amendments; and, by the penumbral process, this protection properly and necessarily should extend to embrace fetal life. A fetus is not a "different being" from a human being. A human being after birth is the "same being" as before; he or she is merely at a different state of development from his or her fetal stage. A human life is a continuum, not a chain of loosely linked segments, and one's existence is assured at the biological level by the same kinds of internal stimuli and reactions throughout one's temporal development. The human element cannot be divorced from *zoos*. There can be no "human" life without human fetal life.

This view obviously places great value in the life of the unborn child. Unfortunately, it is a view not shared by the Court as the Abortion Cases manifest. Having said that, we also take care to note that this Court has never held that nonviable fetal life has no value to society at all. The major predicate of the decision below is that the state can have no legitimate interest in nonviable fetal life. We do not read the Court's opinion in the Abortion Cases or their progeny to go this far. As much as we disagree with the opinions in the Abortion Cases and, indeed, the disagreement of this *amicus* is widely known, it would come as an even greater shock to learn that the state has absolutely no legitimate interest in a nonviable human fetus.

Clearly, the state has such a legitimate interest. The question posed by the practice of abortion is the value

of human life itself. The right to take a life has always been presumed to be a public right, exercised only under the most rigid rules of due process. The legislature has, we believe, constitutional authority to make the decision that government will not pay to have human life destroyed.

The decision with respect to the expenditures of public funds is a matter properly within the ambit of the will of the public as expressed through the political process. *Poelker v. Doe*, 432 U.S. 519 (1977). Moreover, this court has repeatedly held that such legislation which allocates the disbursal of limited public funds is given wide latitude under our constitutional system. *Lindsey v. Normet*, 405 U.S. at 74; *Dandridge v. Williams*, 397 U.S. 485; and *Williamson v. Lee Optical Co.*, 438 U.S. 483.

CONCLUSION

The holding of the Court below misapplies the decision in *Colautii v. Franklin*. Moreover, its treatment of fetal life is not warranted by the holding in the Abortion Cases or their progeny. Since the major predicate of the Court's decision is erroneously taken, it is clear that the decision must be reversed.

Respectfully submitted,

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